

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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:
JOSE BAUTA, :
:
Plaintiff, : 14-CV-03725 (RER)
:
v. : 225 Cadman Plaza
: Brooklyn, New York
GREYHOUND LINES, INC., *et al.*, :
: May 21, 2019
Defendants. :
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TRANSCRIPT OF CIVIL CAUSE FOR TELEPHONE CONFERENCE
BEFORE THE HONORABLE RAMON E. REYES, JR.
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

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(Appearances continue on next page.)

Proceedings recorded by electronic sound recording, transcript
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3 APPEARANCES CONTINUED:

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1 (Proceedings began at 3:30 p.m.)

2 (Audio cuts in and out at times.)

3 THE OPERATOR: There are seven participants on the
4 call including you. You are joining your conference as the
5 host. For many of available commands, press star pound.

6 THE COURT: Good afternoon. This is Magistrate
7 Judge Reyes. We're holding a telephone conference in the case
8 of Bauta v. Greyhound Lines, Inc., Docket No. 14-CV-3725.

9 Counsel for the plaintiff, please state your name
10 for the record.

11 MR. McELFISH: Raymond McElfish for the plaintiff.
12 Good afternoon, Judge.

13 THE COURT: Good afternoon. Counsel for Greyhound.

14 MR. BARMEN: Good afternoon, Your Honor. Brad
15 Barmen for Greyhound Lines.

16 MR. SAAL: Good afternoon, Your Honor. It's Steven
17 Saal, Marshall, Dennehy for Greyhound Lines and Sabrina
18 Anderson.

19 MR. ORTIZ: Good afternoon. Rob Ortiz from Shaub,
20 Ahmuty, Citrin & Spratt also for Greyhound.

21 MR. SHAUB: Jonathan Shaub from Shaub, Ahmuty,
22 Citrin & Spratt for defendants as well.

23 THE COURT: Is there anyone else on the line?

24 MR. McELFISH: Judge, you've got John Keefer for the
25 plaintiffs also.

1 THE COURT: All right. Okay. We have a lot to talk
2 about. Where should we start?

3 MR. BARMEN: Your Honor, this is Brad Barmen.
4 Considering -- I agree, we do have a lot to talk about. I
5 think one of the major issues is the disagreement we have
6 relative to the scope of causation in this trial because I
7 think that would -- talking about that first may help us with
8 some of the ancillary issues.

9 THE COURT: Okay. Well, what's the disagreement?

10 MR. BARMEN: Well, very simply based on the filings
11 our discussions with Mr. McElfish. Mr. McElfish is under the
12 [inaudible] that the first jury determined that Mr. Bauta's
13 lumbar injury was caused by the accident. The defense
14 disagrees because the verdict's form that the jury actually
15 executed says do you find that the lumbar injury was caused or
16 exacerbated, exacerbated by the accident. Based on that that
17 was what the jury found but they never were asked to
18 differentiate between whether they found that the injury was
19 actually caused by the accident or there was a pre-existing
20 condition that was aggravated by the accident.

21 So at this point we believe we're entitled to put on
22 evidence that -- similar to the first trial that he had a pre-
23 existing lumbar injury that was aggravated by the accident and
24 the extent of that is certainly relevant to any finding on
25 past and future pain and suffering for that injury.

1 THE COURT: But aren't you the ones who raised the
2 request that the special verdict form be phrased that way?

3 MR. BARMEN: Well, honestly I don't recall.

4 THE COURT: I just checked it about five minutes ago
5 and that's what Mr. Saal put in in the proposed special
6 verdict form.

7 MR. BARMEN: Okay. Well, then that was the verdict
8 form that the jury executed. So I disagree with plaintiff's
9 counsel representation that he's made multiple times in these
10 letters and replies that he's filed saying that the first jury
11 found that the injury was caused [inaudible - static] that's
12 not what they found.

13 THE COURT: They found that it was caused or
14 exacerbated by. So what --

15 MR. BARMEN: Correct.

16 THE COURT: How is that going to make a difference
17 in the -- in a trial for -- on pain and suffering alone?

18 MR. BARMEN: Well, because certainly I believe it's
19 reasonable to expect if the jury finds that he already had a
20 problem that was just made worse by that could impact how they
21 see the severity of any damage number they want to fix.

22 THE COURT: So we have to retry causation then?

23 MR. BARMEN: No, no, no. Well, to an extent but in
24 terms of it's the same experts that testified last time. For
25 the defense it would be Drs. Casden, Rabin and Prolinzali

1 [Ph.] to explain the films, and one of the reasons I wanted to
2 start with this issue, Your Honor, because one of the things
3 plaintiff is trying to do is exclude those witnesses as being
4 irrelevant. Obviously we disagree with that.

5 It doesn't -- it doesn't change the scope of what we
6 intended to get to. Frankly we were surprised by plaintiff's
7 position that the first jury in his mind found that the injury
8 was caused by because that's not what the verdict said. So we
9 were under the impression until the most recent filings that
10 that was the main issue in dispute for this trial.

11 [Pause in proceedings.]

12 THE COURT: Mr. McElfish, do you want to be heard on
13 this?

14 MR. McELFISH: I do. So Mr. Barmen I don't think
15 read my latest reply in which I said that causation
16 encompasses two potential possibilities. One that the
17 accident caused the injury or two, that the accident
18 exacerbated the injury. We agree it was one or the other as
19 the jury has found. So I don't think they get to now try to
20 convince a new jury that the injury or the condition pre-
21 exists the accident because the first jury based on Mr. Saal's
22 verdict form has found that it was one or the other.

23 If the first jury had found that it was not caused
24 by the accident and not -- a prior condition was not
25 exacerbated by the accident we wouldn't be retrying the case.

1 So I don't -- I think Mr. Barmen misunderstands my position
2 and I think that it's pretty clear that that would eliminate
3 the need to try causation again. I never said their expert
4 should be excluded. What I said was given that was the main
5 purpose for using them I would like to request an offer of
6 proof from them as to what beyond that they would testify to
7 that would be within the scope of a non economic damages case
8 inside their deposition.

9 So I don't think they get to put on evidence as to
10 what caused the injury or what exacerbated the injury or even
11 found.

12 THE COURT: But don't you think it makes a
13 difference -- don't you think it makes a difference on the
14 amount of pain and suffering whether the injury was caused by
15 the accident or whether the injury was exacerbated by the
16 accident?

17 MR. McELFISH: Well, no. This leads into a separate
18 issue to be discussed [inaudible] is that to what extent are
19 we going to tell the new jury anything about what the first
20 jury found. Certainly I think the new jury needs to
21 understand --

22 THE COURT: Don't -- no, no. Don't go -- that's a
23 separate issue.

24 MR. McELFISH: I'm going to --

25 THE COURT: That's a separate issue. Does it make a

1 difference on the amount of pain and suffering he's entitled
2 to whether it was -- whether his injury was caused by the
3 accident or whether it was exacerbated?

4 MR. McELFISH: I don't believe it does, no.

5 THE COURT: So in an exacerbation case you get the
6 same level of pain and suffering as you do in a -- in a case
7 where there's -- there is no exacerbation, there was no prior
8 injury and the defendant's caused whatever happened.

9 MR. McELFISH: Correct.

10 MR. ORTIZ: Your Honor, this is Rob Ortiz. How are
11 you? I just wanted to just chime in on that last point. No,
12 it is actually different in terms of an exacerbation or
13 aggravation and there's a specific charge that's given that if
14 it's an exacerbation case you're only supposed to award for
15 the exacerbation, not for the underlying condition.

16 So the fact that the jury previously said either or,
17 we at this trial are still able to argue -- we're not saying
18 that -- I think that one of the confusions is that we're not
19 saying that he cannot recover. There's no scenario where Mr.
20 Bauta doesn't recover pain and suffering where you're saying
21 causation means yes or no and it's either a zero or he gets
22 money.

23 That's not what we're saying. What we're saying is
24 by virtue of the prior jury's verdict they determined that
25 either or occurred. Either it was caused by, meaning he

1 didn't have a prior back injury and it came only from the bus
2 accident, or it was exacerbation. We don't know which but
3 that was enough to recover but the difference is as you just
4 apply pointed or you posed the question, is there a
5 distinction and under New York law there is. In fact, that's
6 one of the charges that you give in them making the award they
7 have to consider that. I can give you the charge language if
8 you'd like.

9 THE COURT: What did -- where did we charge -- I
10 don't have my jury charge right in front of me. Do you know
11 what the -- where the charge is on the docket sheet that we
12 gave them?

13 MR. ORTIZ: Are you asking me, Your Honor, or
14 someone else?

15 THE COURT: Yes, I'm asking you, Mr. Ortiz. Do you
16 know?

17 MR. ORTIZ: I can pull it up if you give me one
18 second. I apologize.

19 THE COURT: The docket is only 765 entries long.

20 [Pause in proceedings.]

21 MR. ORTIZ: I don't have the number on it but I have
22 a copy of the hard -- the charge that you gave.

23 THE COURT: Well, why don't you read what we did?

24 MR. ORTIZ: I'm just going to that page if you bear
25 with me.

1 [Pause in proceedings.]

2 MR. ORTIZ: So it's on Page 12 of your charge. Do
3 you want me to read that?

4 THE COURT: Yes.

5 MR. ORTIZ: "So if you find that before this
6 accident the plaintiff had pre-existing -- " Remember, that
7 was cervical lumbar at that time. Now it would just be
8 lumbar. "Lumbar spine dysfunction and/or degenerative changes
9 and further find that because of the accident one or more of
10 these conditions was aggravated so as to cause increase
11 suffering and disability then the plaintiff is entitled to
12 recover for any increased disability or pain resulting from
13 such aggravation. However, he is not entitled to recover for
14 any physical ailment or disability which existed prior to the
15 accident or for any injuries from which he may now be
16 suffering which were not caused or attributed to by the
17 accident. The plaintiff can only recover for damage caused by
18 aggravation of the pre-existing condition, not the condition
19 itself. The plaintiff should be compensated only to the
20 extent that you find his condition was made worse by
21 defendant's actions."

22 So that's the charge you gave right before your
23 closing instructions in Part 3 of the charge. That's based on
24 -- I don't know exactly. There's a specific New York PJI
25 section as well that deals with that and that's what it is.

1 So that goes to the question that you asked before is there a
2 difference and with all due respect to Mr. McElfish, there is.
3 And if the jury here believes -- based on the evidence that's
4 going to be presented we present evidence saying look, it's
5 our position that it was pre-existing, that it only got worse
6 -- anything that happened it only got worse but the underlying
7 condition was there then the jury would award just for the
8 exacerbation.

9 If they conversely believe Mr. McElfish's proof that
10 he didn't have anything that was pre-existing and that it was
11 all caused by the accident well, then they don't pay the award
12 for the full value of it.

13 And then in your review, let's say there's an
14 excessive verdict just for an example and there's a review,
15 when we talk about what's sustainable under New York law then
16 we can say well, they found exacerbation or they found
17 causation but we can look at it and actually I would suggest
18 we actually have a question. We can't say it didn't happen at
19 all and again I think that's part of what Ray's -- Mr.
20 McElfish's issue -- we're not saying it didn't happen at all
21 or he can't -- there's a way of us getting a zero here, okay,
22 but it's one or the other.

23 It's either it was caused by the accident or he had
24 the underlying condition and it was made worse by the
25 accident. And it's important to know that because it's an aid

1 to the court in looking at excessiveness or inadequacy later
2 post verdict. I try not to repeat myself but I think that
3 covered it.

4 THE COURT: So where in essence -- what the
5 defendant proposed is in essence asking this jury to pick from
6 either caused by or exacerbation by.

7 MR. ORTIZ: Right. Without a possibility of saying
8 he gets zero which I think is what Mr. McElfish's concern was
9 or maybe. I don't want to speak for him.

10 THE COURT: I don't think you should ever try to
11 speak for Mr. McElfish. He does a good enough for himself.

12 MR. ORTIZ: Okay.

13 THE COURT: But you see that -- all right. Mr.
14 McElfish.

15 MR. McELFISH: A couple of things. That's why I was
16 getting ready to say that it goes to the charge. I mean
17 basically the jury here should be instructed that the injury
18 was caused by or exacerbation by, and that's the language the
19 defendants asked for. You were correct about that. I believe
20 it was actually Mr. Ortiz and Mr. Saal together who asked for
21 that and to come to a reasonable amount of money for either
22 the causation or the exacerbation and --

23 THE COURT: But how they can do that without having
24 evidence on caused by or exacerbation by?

25 MR. McELFISH: That's an interesting question

1 because the defense expert previously -- let me just think
2 this through if you don't mind. The defense experts
3 previously testified -- I mean their only real opinion for it
4 is that the injury did not or the accident did not exacerbate
5 things. So it's going to be interesting --

6 MR. BARMEN: Whoa, whoa. Wait, wait. That is
7 completely --

8 MR. McELFISH: May I finish, please?

9 THE COURT: Let him finish. Let him finish.

10 MR. BARMEN: Well, no.

11 THE COURT: Yes, yes. Let him finish.

12 MR. McELFISH: So their opinions were -- and I have
13 Mr. -- Dr. Casden and Dr. Rabin and Dr. Prolinzali in mind
14 were basically this was a condition that pre-existed and was
15 not caused or exacerbated by the accident. So I'm not sure
16 how now that discovery is closed they're going to change that
17 to say that it was exacerbated by the accident. I just don't
18 see how they're going to now do that. I mean it's already
19 been decided. It was their language.

20 MR. BARMEN: This is Brad Barmen. May I now respond
21 to that?

22 THE COURT: Yes.

23 MR. BARMEN: Okay. That is a complete
24 misrepresentation of what the R3 defense experts found. They
25 all agree that Mr. Bauta had a pre-existing lumbar injury,

1 that there's no way the [inaudible] herniation was traumatic,
2 that the retro-spondylolisthesis was traumatic, that the nerve
3 root impingement was traumatic. They all said at worst the
4 accident aggravated the condition that already existed and
5 they explain their findings for that. Particularly Rabin and
6 Prolinzali using the films, Prolinzali being a neuro
7 radiologist. So all to a man found that a) it wasn't caused
8 by the accident; and b) if anything it was an aggravation of a
9 pre-existing condition and it's clear in the record.

10 And to talk about -- Mr. McElfish brings up this
11 issue of a request for an offer of proof, we have been going
12 back and forth on this for weeks in the preparation of the
13 Rule 16 and meeting and conferring. We are all in agreement
14 and have been in agreement that the playing field here are
15 witnesses who testified in the first trial and evidence that
16 was admitted in the first trial. There's absolutely no reason
17 for an offer of proof because Mr. McElfish cross-examined all
18 three of these experts at trial. He knows exactly what they
19 said then and he knows what they're going to say now. The
20 testimony is going to be the same relative to the mechanism
21 [inaudible].

22 THE COURT: All right. Anything else, Mr. McElfish,
23 on this issue?

24 MR. McELFISH: No.

25 THE COURT: I'm going to let the doctors testify as

1 they see fit on the issue of caused by or exacerbated by.
2 They of course will not be able to argue that he doesn't have
3 an injury because the first jury found that he had an injury
4 and it was either caused or exacerbated by. So look at their
5 depositions, look at their expert reports and we'll see what
6 they can and can't say.

7 MR. BARMEN: Can I ask a follow up to that? I
8 understand your ruling. The long -- I think as long as the
9 jury receives a charge, it doesn't have to necessarily be --
10 they don't necessarily have to be told that this was the first
11 jury's finding I don't think but at least that they receive a
12 charge that there was already a finding of caused by or
13 exacerbated by. That's why I kept talking about the charge
14 because I think the charge is [inaudible] with this so-called
15 proffer of evidence.

16 THE COURT: We're going to work on a preliminary set
17 of jury instructions before we start the trial and a jury
18 charge for when the evidence is in. In addition, a
19 description of the case for jury selection and we'll have all
20 of that prior to the start of the trial so you can see where
21 we're intending to go.

22 MR. BARMEN: Okay.

23 THE COURT: So that takes care of the defendant's
24 medical experts and what they can testify about. What's next,
25 the next issue that you want to talk about? I want to --

1 MR. BARMEN: I guess next in line would be -- I
2 guess next in line would be whether they can get into --
3 whether or not the treatment was reasonable and necessary. I
4 don't think they should be able to do that or past work
5 [inaudible].

6 THE COURT: Where is that in the papers that you
7 submitted?

8 MR. BARMEN: It's all over my briefs. I know I went
9 through it again in my latest reply on Sunday.

10 [Pause in proceedings.]

11 THE COURT: That's the last thing. Your last --
12 it's not all over. There's one paragraph.

13 Are you intending to get into that?

14 MR. BARMEN: Are you asking the defense or Mr.
15 McElfish?

16 THE COURT: No, you, Mr. Barmen.

17 MR. BARMEN: Well, certainly I don't think there's
18 any -- yes, to an extent because we believe he over treated to
19 inflate the damages. Mr. McElfish wants the jury to know what
20 the first jury found in terms of awards and certainly if that
21 happens we should be able to put on evidence through our
22 experts again, the same medical experts, that the treatment he
23 received a lot of it was excessive, unnecessary, unreasonable
24 [inaudible]. For example, chiropractic manipulation under
25 anesthesia for someone claimed that traumatic [inaudible]

1 herniation. This is all testimony again that came in from the
2 first trial.

3 What Mr. McElfish wants to do is he wants to be able
4 to put in everything that the --

5 THE COURT: We're not retrying the case. We are not
6 retrying the case. I want everyone to be clear about that.

7 MR. BARMEN: We certainly don't intend to.

8 THE COURT: I want everyone to be clear about that.
9 We are not retrying the whole case. I know that's what you
10 want to do. I know that's what you want to do but we're not
11 doing it. Okay?

12 MR. BARMEN: Your Honor, from the defense
13 perspective I can assure you that is not what we want to do or
14 intend to do but we need to be able to respond reasonably to
15 what Mr. McElfish does.

16 THE COURT: Listen, the jury is not going to be told
17 that he received a cane and money for Percocet and -- they're
18 not going to be given a copy of the special verdict sheet and
19 we're not going to go through all that evidence over again.
20 This is about his pain and suffering and as everyone has done
21 from the beginning of this case you're making it into much,
22 much more than it is.

23 MR. BARMEN: I understand that, Your Honor, but my
24 concern, the defense concern on this issue is Mr. McElfish
25 getting up and saying he's got hundreds and thousands of

1 dollars in medicals to try and bolster -- think that there's a
2 correlation between how much medical treatment and how much
3 the specials were in terms of pain and suffering. The higher
4 the special number the correlation is the higher the pain and
5 suffering. If he's going to -- we need to be able to respond
6 because we have evidence that demonstrates otherwise. We have
7 experts to state otherwise. We're not looking to go tit for
8 tat. We're not looking [inaudible] certainly talk about
9 issues of \$30 for this limitation or \$30 for that limitation.

10 What we're talking about is -- one of the concerns -
11 - the back and forth we have had, Mr. McElfish and I,
12 [inaudible] going through this is what he thinks the jury
13 should be told. Well, what he thinks the jury should be told
14 necessarily requires us to be able to respond assuming the
15 court is going to grant him to some extent what he's
16 requesting.

17 We have our hands tied. We understand that. We had
18 our hands tied in the first trial relative to liability both
19 for causation and punitive damages and we have our hands tied
20 even further in this case and I understand it because we now
21 own the back injury to some extent whether there was causation
22 or exacerbation but we still have to be able to put on a
23 defense to what he does. We have to be able to try and
24 mitigate if permitted to have the opportunity to litigate with
25 the evidence that we have the number. That's all we're

1 seeking to do. We're just seeking an even playing field to
2 the extent it's possible under the circumstance.

3 THE COURT: What do you propose to tell the jury
4 about, Mr. McElfish, about what the first jury awarded as far
5 as his medical expenses, medical care?

6 MR. McELFISH: Nothing about medical expense
7 [inaudible] costs of care.

8 MR. BARMEN: What about treatment?

9 MR. McELFISH: I was waiting to see how the court
10 felt about that. What my plan was was to put Dr. Mobin on and
11 perhaps Dr. Quartiali [Ph.] on just to walk through the
12 treatment without any necessarily any testimony about
13 reasonableness and necessary standards.

14 THE COURT: Well, they -- they have to be limited --
15 they would have to be limited to what the jury found.

16 MR. McELFISH: Right. Exactly. And just walk the
17 jury through the treatment that he had because that relates to
18 the pain and suffering that he endured during that and what it
19 would mean for the future without cost that the jury found,
20 the first jury found because that would relate to his future
21 pain and suffering but I don't think the defense gets to get
22 off -- if I don't get into reasonable and necessary medical
23 care the jury already found it was reasonable and necessary.
24 So I don't think the defense gets to get up and rebut that.

25 MR. BARMEN: I agree with most of what Mr. McElfish

1 just said but if he's going to have Quartiali, the surgeon who
2 as far as we know is still actively treating his patient, Mr.
3 Bauta, and who testified in the first trial he never had any
4 intention of ever [inaudible] he -- Mr. McElfish wants to be
5 able to put that evidence on and prevent us from getting up
6 and saying [inaudible] it's too much, it's unnecessary when
7 that's what our expert witnesses to a man opined.

8 We're just asking for what's good for the goose --
9 if he's allowed to put in information in front of the jury we
10 should be allowed to rebut it with information that was
11 admitted in the first trial that's relevant to the issues for
12 the lumbar spine. That's all.

13 MR. McELFISH: I think to make it simple, Judge,
14 because it sounds like it's getting far afield, is the first
15 jury -- this is why in the last question I was trying to
16 figure out what you're going to tell the jury about the first
17 trial is if this jury is told that the medical bills were
18 found to be reasonable and necessary -- I'm not getting into
19 amounts obviously -- and that the future needs were found to
20 be reasonable and necessary I don't think anybody needs to
21 talk about costs. Nobody has talked about reasonable and
22 necessary. I think those matters have been decided and should
23 be eliminated.

24 MR. BARMEN: But when you talk about reasonable and
25 necessary then does the first jury get told or does this jury

1 get told that based on all that the first jury awarded \$36,000
2 in past, [inaudible] and future.

3 MR. McELFISH: No.

4 MR. BARMEN: But see that's my concern. You want to
5 be able to put in what is good for you to try and raise an
6 inference in the jury's mind that the injury is such obviously
7 worse than we [inaudible] and prevent us from doing anything
8 to rebut that.

9 I understand it's a slippery slope, Your Honor, and
10 I guess the issue is how do we proceed with Mr. McElfish being
11 able to tell the jury what he wants to tell them and the
12 implications and the reason for that obvious and don't need to
13 be stated and yet at the same time expect us not to be able to
14 put in evidence in front of the jury that the first jury saw
15 [inaudible].

16 MR. McELFISH: I think it's being overblown.

17 THE COURT: Well, you're going to -- I'm going to --
18 you're going to see how we will phrase to the second jury what
19 the first jury found. We have to figure that out ourselves
20 and then you will see it prior to trial. No expert can
21 testify as to future pain and suffering beyond what the first
22 jury found as far as his future medical expenses. In other
23 words, I'll --

24 MR. McELFISH: Surgery is a good example.

25 THE COURT: We can use the surgery as an example,

1 right. They found that he is entitled to a lumbar fusion
2 surgery in the future. I'm not going to tell them how much
3 the jury found but we will tell them something about that. So
4 no expert can say well, a lumbar fusion is -- this is what it
5 is, this is the -- painful post surgical recuperation period,
6 whatever, but they can't go beyond that. They can't say oh,
7 he's going to need another surgery or he's going to need a two
8 level fusion or he's going to need lumbar epidural injections
9 because the jury said no, he's not.

10 MR. McELFISH: Right. That was my point is that I
11 don't intend to go beyond what the first jury found but they
12 can't turn around and say well, it's not necessary and he
13 shouldn't have it. That was my whole point with the
14 reasonable and necessary argument.

15 MR. BARMEN: Wait a minute. This is Barmen. The
16 jury did award an amount of money for that future surgery.
17 But if you recall, Your Honor, what the testimony was on that,
18 and it was from Dr. Mobin was a study that he referenced
19 that's in the record that was all patients who had herniations
20 from degenerative disk disease, not trauma, and it was
21 something like 36 percent.

22 THE COURT: Yes, we litigated that in the motion,
23 right, and that stands.

24 MR. BARMEN: I don't under -- what I'm finding is
25 are we allowed to go back to Dr. Mobin and question that

1 study.

2 THE COURT: No, because the first jury found -- the
3 first jury found he's entitled to a future surgery. He's
4 proved that by a preponderance of the evidence. They gave a
5 dollar amount for that surgery with the cost of the surgery
6 and you filed a post trial motion to set that aside and I
7 denied that motion. So you can't now argue to the second jury
8 he's not -- he doesn't need the second surgery. All you can
9 argue is the second surgery is -- equates to whatever level of
10 pain and suffering because the first jury screwed it up by not
11 giving him a dollar amount.

12 We're not relitigating -- Mr. McElfish is right.
13 We're not relitigating what's reasonable and necessary because
14 the first jury already determined that and it's been sustained
15 to a large degree on motion post trial.

16 MR. BARMEN: I'm just trying to make sure I
17 understand what that means in terms of the scope of what we
18 can and cannot do because the first jury gave an amount of
19 money for the future surgery but was there a verdict -- and I
20 honestly don't recall. I don't have it in front of me that
21 says if he's going to need that future surgery. I don't know
22 if there was a finding.

23 THE COURT: Yes, I think that's a fair -- I don't
24 even think if you call it an inference to be drawn from the
25 special verdict sheet and the charge. I could only -- they

1 could only give him damages for things they find he proved by
2 a preponderance of the evidence he will need in the future as
3 a result of the injury being caused or exacerbated by
4 Greyhound's and Ms. Anderson's conduct. The jury has said
5 that. He's going to need a future surgery. He is going to
6 need one year of home care. He's going to need a straight
7 cane for 12 years, yada, yada, yada.

8 So that's what we'll do with that issue. Everyone,
9 all expert witnesses are confined to what the first jury found
10 as far as what is going to be required in the future and they
11 have to say well, this is -- this is painful. This is
12 whatever. This is how it's done and the jury will then -- and
13 the other side will say well, no, that's not how it's done or
14 well, it's not that painful or whatever they're going to say
15 they're going to say and the jury will come up with an amount.

16 Next issue.

17 MR. McELFISH: Criminal convictions. They've argued
18 that they should have them on the back burner, that they might
19 need to use them. As I said in the papers, they're itching to
20 get them in again and I just -- I'm trying to get clarity on
21 the ruling that it has really no place. I only intend -- the
22 outer limits of what I intend to offer by way of evidence is
23 physical limitations that could affect him in all parts of
24 life. I mean the ability to stand, ability to stand, ability
25 to lift weights, ability to run. Those are the things that

1 result from infusion but that -- I just need to make sure that
2 they don't come in and create another mistrial or retrial by
3 putting -- trying to put -- even by inferring some of these
4 convictions. That would be the next issue I think.

5 THE COURT: Mr. Barmen, do you intend to get into
6 the convictions?

7 MR. BARMEN: Only if, Your Honor, Mr. McElfish or
8 Mr. Bauta tell the jury that he's incapable of working because
9 of his injury, and I've had [inaudible] on multiple occasions
10 with Mr. McElfish and the issue is he wants to preclude it
11 whole claw. We certainly understand that your rulings the
12 first trial, and that was really relative to the issues of his
13 anxiety and depression and because of his inability to support
14 his daughters. And we argued and the judge agreed -- you
15 agreed, Your Honor, that okay well, there's reasons why other
16 things that could cause the anxiety [inaudible] to his
17 inability to work.

18 Now, I asked Ray, Mr. McElfish, tell me you're not
19 going to go there and then we don't have an issue and he
20 wouldn't commit to me. Well, I don't intend to but I can't
21 promise what's going to be said on the stand. Okay.

22 And in one of his recent filings, and I don't have
23 it in front of me, Steven. Help me with the docket number.

24 MR. SAAL: Yes, the docket number is 760. It's Mr.
25 McElfish's letter of May 16th.

1 THE COURT: Hold on. Let me find it. Let me just
2 find it. Just a second.

3 [Pause in proceedings.]

4 MR. BARMEN: Second page, Your Honor, bottom
5 paragraph. He specifically includes an inability to work in
6 his papers. It's about eight lines from the bottom of the
7 page.

8 [Pause in proceedings.]

9 THE COURT: Well, certainly -- are you saying now,
10 Mr. McElfish, that you're not intending to get into that?

11 MR. McELFISH: I guess the problem I have is is if
12 you have physical limitations it certainly seems to have an
13 affect on your ability to do physical things or to sit or to
14 do things that would be required to work.

15 If your ruling is that I can't say he's unable to
16 work but he has these physical limitations I'll abide by that
17 ruling to exclude these matters. No problem. I thought I
18 said something different on May 18th. I thought about it
19 after talking to these fine gentlemen. I had said on May 18th
20 that I only intended to get into the physical limitations.

21 THE COURT: The issue of lost wages was not part of
22 the trial.

23 MR. McELFISH: Correct.

24 MR. BARMEN: Correct. Remember, Your Honor, this
25 man was unemployed for the year prior to the accident.

1 THE COURT: Yes. But I'm just wondering how an
2 argument that well, his pain -- his limitations on bending,
3 stretching, sitting, whatever, is going to impact his ability
4 to work and therefore he gets pain and suffering damages where
5 the first jury didn't award him any lost wages, no emotional
6 or psychological damages whatsoever. How does that -- how do
7 we get that in now?

8 MR. McELFISH: I think there's --

9 THE COURT: This is all about --

10 MR. McELFISH: Let me just say this. Prior to the
11 first trial I withdrew any formal economic claims for lost
12 earnings. It wasn't ever presented. The jury never had a
13 chance to reject it or to decide it. So in this case I think
14 there's a huge difference between a psychological claim and
15 PTSD and emotional damages related to depression and anxiety
16 as opposed to the standard mental suffering that you get under
17 the jury instruction for standard pain and suffering, and I
18 think that's the dividing line is that he should be able to
19 say he's unable to work because he's physically unable and to
20 the extent he has mental suffering from the pain he's unable
21 and I think that's the dividing line.

22 MR. BARMEN: Once again, Your Honor, Barmen again.
23 He's trying to handcuff us and he just said it again. He
24 wants to be able to tell the jury that because of the pain,
25 the injury to the back this man could -- can't work, i.e. he

1 would be working but for the back injury from the accident
2 whether it was caused by it or exacerbated.

3 THE COURT: I'll simplify it. If you get into the
4 issue of work in whatever way in the future then that opens
5 the door for the convictions to come in.

6 MR. McELFISH: That's all we were asking for, Your
7 Honor.

8 THE COURT: So steer clear of it and the jury won't
9 hear about that.

10 MR. McELFISH: But physical limitations do not open
11 the door by themselves?

12 THE COURT: No, of course -- that's part of his pain
13 and suffering, his physical pain and suffering.

14 MR. BARMEN: And the defense doesn't disagree with
15 that.

16 THE COURT: Next issue.

17 MR. McELFISH: Before you move on from that, a
18 related matter is I just want to be specific about this is --
19 because right now we're talking about the substantive issue of
20 I guess he would call it earning capacity and you ruled on
21 that. Now I want to turn just for a second to impeachment.

22 Are they -- are you going to allow them for any
23 reason to get into the save a lot application which previously
24 -- I argued previously was not turned over in discovery,
25 contains a job application that contains a misstatement or a

1 lie depending on who you are about whether or not he had a
2 record. I can't imagine how that would be allowed in but I
3 wanted to specifically discuss it on the record with you.

4 MR. BARMEN: Your Honor, in response to that. The
5 save a lot application did come in to the first trial and why
6 it's relevant is very simple. It's the plaintiff lying and
7 his credibility is certainly at issue in a trial about non
8 economic damages. Certainly the defense believes to a certain
9 extent that the claims are exaggerated. I mean we have the
10 surveillance. We have everything else. I've never been
11 involved in a case that I'm aware of as a civil defense lawyer
12 where the plaintiff's own credibility wasn't an issue.

13 MR. McELFISH: Well --

14 MR. BARMEN: And he -- he submitted a false
15 application where he claims he had never been convicted of
16 something when in fact he knew he had.

17 MR. McELFISH: Well, first of all -- that's why I
18 wanted to talk about impeachment, Judge. That's Federal Rule
19 609. And he's now trying to get in an application that I
20 believe is dated 2005 and it's a 13 year old conviction to
21 start with and both items are over 10 years and they haven't
22 shown a substantial need or substantial relevance to it under
23 the rule. So I guess that needs to be looked at.

24 MR. BARMEN: Again, my point is the relevance is
25 simple. It bears directly on the plaintiff's credibility

1 which is always in play no matter what the limited issues in a
2 trial are.

3 MR. McELFISH: It's not in play if it violates 609.

4 MR. BARMEN: Going back to you -- it's in the Rule
5 16. We all agree that evidence that was admitted in the first
6 trial it's relevant to [inaudible] this trial is fair game.

7 MR. McELFISH: No, no, no, no.

8 MR. BARMEN: It was admitted in the first trial and
9 it's relevant to your client's credibility.

10 MR. McELFISH: The plaintiff would seek exclusion of
11 that, Judge, under 609. First of all, I don't know what lie
12 they would be trying to impeach because it has to be something
13 related -- that was an employment application but here we go
14 again. If I don't talk about employment how does that even
15 impeach anything but it also violates 609.

16 MR. BARMEN: I don't want to keep going back and
17 forth on it. I mean the 609 argument was made prior to it
18 being admitted in a trial a year ago. Nothing has changed in
19 terms of the impact of 609 since it was admitted the first
20 time.

21 MR. McELFISH: Well, a lot has changed. I mean he's
22 not making employment claims. He's not making financial
23 distress claims related to his children. I mean a lot has
24 changed. It's a very limited --

25 THE COURT: Well, you're not going to be --

1 MR. BARMEN: [Inaudible] the first time.

2 THE COURT: This is a 2005 job application.

3 MR. BARMEN: I don't remember the date on it but it
4 came after the conviction. Steven, offhand is that right,
5 2005?

6 MR. SAAL: I'm bringing it up right now.

7 [Pause in proceedings.]

8 MR. SAAL: Actually it was a 2010 job application,
9 Your Honor, and I also recall from the court's order on the
10 retrial -- on the motions for a new trial from January 4th the
11 court said that this wasn't a 609 application despite Mr.
12 McElfish's reliance on that section. It was a 403 issue
13 because they --

14 THE COURT: Evidence of --

15 MR. SAAL: Evidence of impeachment based on the
16 convictions themselves. It's evidence --

17 THE COURT: Exactly.

18 MR. SAAL: -- of the fact that he lied on a job
19 application.

20 THE COURT: Exactly. That's what I was going to say
21 is that it's -- 609 prevents evidence of the conviction where
22 the jury finds out what the conviction was about and all --
23 we're not going there. It's simply -- if we're going to use
24 it for cross examining him on his credibility he lied on a job
25 application. You said you never been convicted and in fact

1 you had been convicted of something; correct?

2 MR. BARMEN: Precisely, Your Honor.

3 MR. McELFISH: How is it relevant if he's not making
4 an employment claim or an inability capacity claim?

5 THE COURT: Because if -- if you lie it's relevant.
6 If you lie about anything. If you lie about something that's
7 not material it's relevant because a lie is a lie. I
8 understand your point it's not a lie, it's a misstatement and
9 you can use that on redirect but I think the jury is entitled
10 to know that this guy who -- juries are always entitled to
11 know about someone's credibility. It's the primary reason why
12 you have juries is to assess [inaudible].

13 MR. McELFISH: How far into the conviction are you
14 going to allow this to go?

15 THE COURT: Not far at all. He has been convicted
16 of something. No, he lied on a job application when he said
17 he wasn't convicted.

18 MR. McELFISH: That's it?

19 THE COURT: And when he was convicted of something.
20 Yes, that's it.

21 MR. McELFISH: On something?

22 MR. BARMEN: We never had -- we don't have any
23 intention to go farther than that, Your Honor.

24 THE COURT: No searchable database.

25 MR. BARMEN: No.

1 THE COURT: None of that.

2 MR. McELFISH: So what's the something, just
3 something?

4 THE COURT: You had a conviction and you didn't
5 disclose it on your job application. Not you didn't disclose
6 it. You said you didn't have a conviction when you did.

7 [Pause in proceedings.]

8 THE COURT: Next issue.

9 MR. BARMEN: Your Honor, Mr. McElfish wants to
10 preclude us from bringing in Kelly Peachy. If you recall she
11 was the EMT on scene who initially was the first person to
12 assess Mr. Bauta. She testified by a videotape in the first
13 trial.

14 THE COURT: That he hurt his shin. That's the only
15 thing. Right?

16 MR. BARMEN: Right. That she specifically assessed
17 his head, neck and back, that he specifically denied back pain
18 at the scene, and that the only thing he complained of was the
19 shin pain. We also think it's relevant that -- how he got out
20 of the bus and the fact that he was willingly assisting the
21 EMTs [inaudible].

22 THE COURT: Mr. McElfish.

23 MR. McELFISH: I don't see the relevance of that and
24 then it starts getting into areas of precluded material.

25 MR. BARMEN: What precluded material?

1 MR. McELFISH: That he was with Ms. Wang.

2 MR. BARMEN: It has nothing to do with Ms. Wang. He
3 wasn't with Ms. Wang when he was being assessed by Kelly
4 Peachy. It was the other EMT that he was with Ms. Wang for.

5 MR. McELFISH: Again, how is it relevant to his pain
6 and suffering? I'm not following.

7 THE COURT: If he wasn't in pain -- I guess the
8 defendant's argument if he wasn't in pain immediately after he
9 wasn't in pain. There's no pain. He wasn't suffering.

10 MR. McELFISH: This is the delayed onset issue that
11 I raised.

12 MR. BARMEN: And it's also relevant to the
13 aggravation and exacerbation issue as well but our experts,
14 Your Honor, if you recall say that if he had suffered an 11
15 millimeter herniation and all the damage that's shown in the
16 '15 MRI including the retro-spondylolisthesis that he would
17 have been in excruciating pain immediately. But the plaintiff
18 wants to say the shin pain masked the pain from the 11
19 millimeter herniation.

20 And there was also testimony the first time around,
21 Your Honor, the first time Mr. Bauta claimed of back pain was
22 eight days after the accident after he had retained counsel
23 and we think that's all relevant. Again, it certainly
24 reflects on credibility.

25 THE COURT: Ms. Peachy can testify.

1 MR. BARMEN: The next issue for the defense, Your
2 Honor, unless Ray, you want to go alternating.

3 THE COURT: Yes, let's alternate.

4 MR. McELFISH: Go ahead. Whoever is next.

5 MR. BARMEN: The surveillance, Your Honor. The
6 surveillance -- we had surveillance that was played and
7 entered into evidence in the first trial. Since the first
8 trial since your ruling came out that this was going to get
9 tried again we surveilled Mr. Bauta again. We have additional
10 surveillance material on Mr. Bauta. We disclosed that to Mr.
11 McElfish roughly two months ago. You recall he petitioned you
12 to depose Mr. Bauta again the last time we had surveillance
13 before it was disclosed. We didn't bother with that at this
14 time. We just sent him what we had. Mr. McElfish has taken
15 the position that because it was -- the surveillance was taken
16 subsequent to the first trial obviously it couldn't have been
17 used in the first trial so it should be precluded. Again, it
18 goes to Mr. Bauta's credibility.

19 But by the same token while Mr. McElfish takes the
20 position we should not be able to use the new surveillance
21 that was timely disclosed to him Mr. Bauta has continued to
22 treat with New York Spine and Mr. McElfish asked for the
23 subsequent treating records that obviously couldn't have been
24 in the first trial because they didn't exist at the time just
25 like our surveillance to be in evidence.

1 So the surveillance is no different than -- they're
2 going to get up and say this guy continuing to treat because
3 he's still having [inaudible] and pain and this, that and the
4 other thing. We have additional surveillance that flies in
5 the face of that.

6 So if the new records would be coming in, which we
7 don't object to and frankly I think it's fair game, the new
8 records. So is the new surveillance for the same purpose it
9 was used the last time.

10 MR. McELFISH: Let me correct a couple of things.
11 Mr. McElfish here. The surveillance was disclosed on April
12 22, 2019. I did not ask for the new records. I was asked by
13 the defendants for an authorization. They attempted to
14 subpoena the records from New York Spine and they couldn't get
15 them. So they asked me for an authorization which I gave
16 them. I think it all ought to be excluded. I think that not
17 being able to take any discovery on the surveillance -- I mean
18 I've learned a lot the first time around and I had [inaudible]
19 their investigators because I found things in discovery that I
20 wanted to put on before the jury but here I'm precluded from
21 that and it's just another way to back door new information.
22 I don't think any of it should come in.

23 MR. BARMEN: Just so we're clear on everything, yes,
24 we got the authorization, requested the authorization to see
25 if he had any more treatment since the last trial. But Ray,

1 it was you that asked specifically in an email to Steven those
2 new records would be included in the joint exhibits. So it
3 was your request included in the exhibit.

4 MR. McELFISH: No, no, wait a minute.

5 MR. BARMEN: It was. And wait a minute.

6 MR. McELFISH: Let me straighten -- let me
7 straighten this out.

8 MR. BARMEN: I'm not done yet. I'm not done
9 talking, Ray.

10 So in terms of any discovery, you didn't request any
11 since we disclosed the surveillance to you. You didn't
12 request to depose the investigators again. You didn't request
13 a deposition of your own client. You were silent on it until
14 the Rule 16 where you objected to it.

15 THE COURT: So, Mr. McElfish, I want to be clear.
16 The post trial treatment records you're saying you don't
17 intend to use them.

18 MR. McELFISH: I just -- the answer is correct and
19 I'd like to answer what he says is that only a week ago as we
20 were putting trial exhibits together I asked Steven to include
21 them just because you might want to see them in making your
22 rulings but it was the defendants who were out seeking them
23 with subpoenas and authorizations. I considered discovery
24 closed. Since this day it's been closed prior to the first
25 trial. So that's why I didn't seek discovery on the

1 surveillance. That's why I didn't produce voluntarily any of
2 these medical records as if discovery was open. So I don't
3 think it should be used. I don't think any of it should be
4 used. I didn't ask for any of it.

5 THE COURT: Mr. Barmen, last point.

6 MR. BARMEN: Your Honor, they're going to be talking
7 about future medicals which we've already discussed, what he's
8 going to need in the future. The fact that he's still
9 treating with Quartiali. So those records are relevant and
10 he's going to come in -- Mr. Bauta [inaudible] trial again
11 with his cane and tell the jury that it takes him two hours to
12 get out of bed and how much pain he's in every day yet we have
13 recent surveillance where he's strolling around Brooklyn like
14 you, me, Steven or anybody else, much like we saw the first
15 time.

16 So it's certainly relevant to his credibility when
17 he's going to come in and say I'm in this kind of pain and
18 it's constant to this day we should be able to show the jury
19 what he looks like on days when he's not -- when he doesn't
20 think he's being looked at. And it's no different than the
21 first time around.

22 And of course discovery was closed prior to the
23 first trial but at the time we tried the case and everything
24 else we didn't know that we would be having another trial. So
25 we made the decision at that time to do a few more days of

1 surveillance and we happened to get him on days when he was
2 out walking around. Now, certainly like the last time he can
3 come in and say well, I was having a good day that day, I have
4 good days and bad days and you caught me on a good day. They
5 can absolutely do that which is what I would expect them to
6 do.

7 But when he's going to come in and tell this jury
8 that he's still suffering we should be able to give a jury a
9 peak at how he appears when he's not in front of a jury.

10 MR. McELFISH: Only discovery, Judge. It's
11 inappropriate.

12 THE COURT: I'm going to reserve decision on the
13 2019 surveillance. But I have to think about it. I will make
14 the same ruling with respect to the post trial medical
15 records. Either both are coming in or both are going to be
16 excluded along with any testimony related to that. And I'll
17 let you know when we start -- before we start. Make a note of
18 that.

19 I want to take an issue next. It's related. It's
20 Christine Gautheir and Sean Lanigan.

21 MR. McELFISH: Yes, Your Honor.

22 THE COURT: You want to exclude them, Mr. Barmen;
23 correct?

24 MR. BARMEN: Yes, Your Honor. Those were --
25 remember, Mr. McElfish subpoenaed all four investigators.

1 Those were two investigators that went out to try and find Mr.
2 Bauta and never got it. So Mr. McElfish wants to come in and
3 make an issue of the efforts we went to. We can certainly do
4 that with Sean who's their boss which you did last time in
5 terms of how much money we spent on surveillance. But there's
6 no need to parade in two unnecessary witnesses who are going
7 to say yeah, I went to find him and I never saw him. You get
8 that information from the two that actually did see him or the
9 one that actually saw him and the one that was responsible for
10 the assignment.

11 THE COURT: That would be Scott Whitlock and Chris
12 Viggiano.

13 MR. BARMEN: Viggiano, yes, Your Honor.

14 THE COURT: So you --

15 MR. BARMEN: I said Sean. I meant Scott. I
16 apologize.

17 THE COURT: So you have no problem with Mr. Whitlock
18 and Viggiano testifying, just not Gautheir and Lanigan?

19 MR. BARMEN: It's cumulative. It's unnecessary.
20 They add nothing.

21 THE COURT: Why do you need them to testify, Mr.
22 McElfish?

23 MR. McELFISH: As Mr. Barmen says, Judge, everything
24 from the first trial comes in the second trial. They had
25 relevant testimony as to their effort. Certainly, Gautheir

1 testified as to how her attempts to try to locate him. And
2 Mr. Lanigan testified as to basically the overall operation
3 that they were running and the amount of money that it cost.
4 That was all admitted.

5 THE COURT: You're going to be able to get all these
6 people in that you intend to get in in a week?

7 MR. McELFISH: Sooner. I put my case on quick.

8 THE COURT: Just like last time, right?

9 MR. McELFISH: I was pretty quick on compensatory
10 damages.

11 MR. BARMEN: You said it, Your Honor. Not me.

12 MR. McELFISH: If you exclude causation, it would be
13 really quick.

14 THE COURT: There's no way to exclude causation
15 other than telling the jury that there is causation. They
16 have to decide which one.

17 MR. McELFISH: Right. Okay.

18 THE COURT: All right. I'll allow them to testify.

19 MR. BARMEN: Your Honor, the next issue for the
20 defense is [indiscernible] put in numerous autographs that
21 were not part of the Rule 16. And some of the ones that he
22 wants to now include despite his representation were not
23 admitted in the first trial. We think the fact that they were
24 not included in the Rule 16 is enough to preclude them.

25 Mr. McElfish stated in his letter request for that

1 that he didn't have time to review the Rule 16 closely enough
2 because of his trial schedule. There were five or six
3 versions, red line versions that went back and forth primarily
4 between Mr. Saal on our end and exclusively Ray, Mr. McElfish
5 on the other end. In fact, we tried to move things along by
6 working either with Mr. Kieffer. We requested that someone
7 else in Ray's office. Ray insisted that it be him. So for
8 him to say that he didn't have time to review it despite the
9 fact that we had emails back and forth with the five or six
10 different redline versions just doesn't make sense to me.

11 But more importantly, the law is pretty clear on
12 this. Him being too busy even if that were the case, isn't an
13 excuse and he's waived the right because it wasn't in the Rule
14 16, it was agreed to by the parties and submitted, to now put
15 those in over our objection. And that's just for the ones we
16 actually used in the first trial.

17 The photographs themselves don't add anything for
18 the purposes of pain and suffering. You know, we own the
19 accident. We own the BAP. He's not bringing anyone in. His
20 biomechanics engineer has not been identified in this trial,
21 John Smith. So to try and have the jury to infer what the
22 forces could have done is inappropriate. There's no one
23 that's going to come in to authenticate the photographs. A
24 couple of them are after the vehicles were separated.
25 [Indiscernible] can't authenticate those. He wasn't at the

1 scene after the vehicles were separated. He's already been
2 transported.

3 So there's an authentication problem. There's a
4 relevancy problem. There's a prejudice problem, separate and
5 apart from the issue with the Rule 16. Steven, am I missing
6 any?

7 THE COURT: Are there any pictures that were in the
8 joint pretrial order?

9 MR. SAAL: No, there were no photographs as to the
10 bus accident in the joint pretrial order, Your Honor. The
11 only photographs listed in the joint pretrial order were the
12 photographs of plaintiffs' injuries.

13 MR. BARMEN: Which we have no objection to, if I
14 recall, Steven. Is that correct?

15 MR. SAAL: No, no stated objections.

16 MR. BARMEN: Right.

17 THE COURT: Mr. McElfish?

18 MR. McELFISH: Yeah. As I put in my papers, the one
19 case that Mr. Saal cited was way off the mark involving Judge
20 Spatt and Judge Boyle where they found that a lawyer's
21 schedule wasn't sufficient because there was a history and
22 pattern. I don't remember the name of the case. It's in the
23 papers, where there was a history and pattern by the lawyer
24 trying to assert that he was too busy. And Judge Spatt said,
25 no, I agree with Judge Boyle. This pattern of conduct was

1 deliberate, and there was a whole history of it that was
2 cited.

3 So the law is not clear, as Mr. Barmen said, number
4 one. Number two, I was being very honest with the Court. I
5 was in the middle of a five-week trial. I had -- it wasn't
6 anything to do with the Rule 16 or the redlining. I simply
7 went through the exhibits and the damages and did not go
8 through the exhibits and the liability, and those were the
9 photos that were in that section.

10 And I'm simply saying, first of all, it was an error
11 on my part that Mr. Bauta should not be penalized for, number
12 one. There's no prejudice to the defendants, and I think it
13 was a week after the Rule 16 was file where I was done with
14 this trial out here. So there's no prejudice in the timing of
15 it. Whether or not there's prejudice with them being in the
16 case is a different issue. It is just to give -- and I'm
17 agreeable. I said this in the papers. I'm agreeable to one
18 or two or three photographs and give the jury an idea of what
19 the case is about and what the accident basically looked like
20 and what Mr. Bauta endured. I don't intend to use them for
21 any other purpose.

22 So yeah. That's my position.

23 THE COURT: Well --

24 MR. BARMEN: And if I may respond briefly, Your
25 Honor?

1 THE COURT: Go ahead.

2 MR. BARMEN: Those two or three, whatever he wants
3 to use, to try and demonstrate to the jury what Mr. Bauta
4 endured is one of the issues we have with this because there's
5 nobody going to come in this trial to explain to the jury what
6 Mr. Bauta endured. They're going to see photographs of a very
7 bad accident. They're not going to hear about how the forces
8 dissipate as you go back and where Mr. Bauta was sitting and
9 how the impact forces were different on the people in the
10 front of the bus versus the middle of the bus, like the back
11 of the bus, the things they heard the first time around.

12 All they're going to see is photographs of what was
13 a bad accident. And it's for no other purpose than to
14 prejudice and inflame without anyone to authenticate it or put
15 it into the proper context as it relates to the impact to Mr.
16 Bauta.

17 MR. McELFISH: For --

18 THE COURT: He's not done yet.

19 MR. McELFISH: Oh, I thought he was done.

20 MR. BARMEN: You know, I am done.

21 THE COURT: Okay.

22 MR. McELFISH: Last word?

23 THE COURT: Yes.

24 MR. McELFISH: Mr. Bauta can authenticate. He was
25 there. He saw the vehicle. He lived through this. What Mr.

1 Barmen is explaining is a biomechanical analysis. No one's
2 going to make any argument about forces or any of that. It's
3 just any one, two, or three of the photographs that would be
4 allowed would simply be used to show the juror, to set the
5 scene and let them understand what they're actually providing.

6 MR. BARMEN: And it's exactly that type of prejudice
7 we're trying to avoid because they're not going to get any
8 context other than that. Mr. McElfish can tell the jury this
9 was a bad accident. Nobody disputes that. But the impact of
10 those pictures with no context and nothing else and no
11 explanation on the forces, if Mr. McElfish had identified John
12 Smith and John Smith was going to come in to discuss that, we
13 wouldn't be objecting to it other than the fact that they
14 weren't disclosed in the Rule 16 as they should have been.

15 And there's an issue with, you know, him wanting to
16 submit eight or ten of them and only four or five of them were
17 actually admitted in the first trial. But that's a different
18 issue -- they're going to -- the impact of seeing that bad
19 accident and then talking about pain and suffering with no
20 bridge between what it actually did to Mr. Bauta.

21 Now, a couple of those photographs, again, are after
22 the vehicle were separated. Bauta wasn't there then. He
23 certainly can't authenticate those. And he can describe what
24 this accident was. Mr. McElfish certainly is going to in open
25 and close and every other opportunity he has. The photographs

1 themselves, the potential prejudicial value of them outweigh
2 any relevance to the limited issues in this trial, and that's
3 exactly their intent in trying to get it in front of the jury.

4 MR. BARMEN: Now may I have the last word?

5 THE COURT: All right. Fine.

6 MR. BARMEN: Real quick, Judge. I'm not going to
7 call John Smith back in because for the -- not because I don't
8 want to put the pictures in but because the jury's already
9 decided causation. So there was no need for him.

10 And I recall what you said about the pictures of Ms.
11 Wang when she was relevant to the first trial. Just because a
12 picture is bad doesn't mean it's prejudicial. Undue prejudice
13 is something different than inherent prejudice. Just because
14 it was a bad accident and the jury gets a chance to see what
15 it is they're deciding and what it is it's about is not the
16 kind of prejudice that 403 was contemplating.

17 THE COURT: Agree to one picture. If you can't
18 agree, then you each some with the one picture you propose and
19 I'll pick it. Jury needs some context.

20 Next issue.

21 MR. McELFISH: I'll just jump in if Brad, you're
22 ready -- not ready?

23 MR. BARMEN: No, go ahead.

24 MR. McELFISH: Dr. Goldman, they're trying to get in
25 Dr. Goldman's notes about Mr. Bauta going on a bus ride. I

1 think there's a way they can get that in without Dr. Goldman
2 or her notes. She would need to be cross-examined on the
3 context of her notes. Because one thing I remember her saying
4 was, Yeah. I wasn't looking at his back. I mean I wasn't
5 interested in that. I was interested in -- I mean it was a
6 therapy session. I was interested in his flashbacks of PTSD.
7 So I think Goldman ought to be excluded and her notes as to
8 hearsay ought to be excluded.

9 MR. BARMEN: And, Your Honor, Barmen again. The
10 defense position on that is pretty simple. Yeah, Dr. Goldman
11 was treating the emotional. She's a psychologist, but in her
12 notes, as you would expect for someone -- a mental health
13 professional treating someone whose injuries mental and
14 physical allegedly stem from an accident, she would ask him
15 about his pain. And that's in her notes. And they discussed
16 it at times.

17 More importantly, it goes to Bauta's credibility
18 specifically. He said, you know, his pain he can't sit for 20
19 minutes at a time, yet, a couple of weeks after this accident
20 he was on a bus, a Greyhound bus for eight hours one way to
21 Syracuse, stayed there for a day and rode it eight hours back.
22 Then a few months later, in July, he did it again, another 16-
23 hour round trip, when he claims he can't sit for any period of
24 time because of his back.

25 So that's why Dr. Goldman, it goes directly to Mr.

1 Bauta's credibility. It goes to his suffering because he's
2 going to claim he can't do certain things, and we have
3 evidence in his own medical records that he was doing certain
4 things that he claims in deposition and at trial previously he
5 couldn't do. That's why she's relevant.

6 THE COURT: She can testify, and the records can
7 come in.

8 MR. McELFISH: [Inaudible].

9 MR. BARMEN: And my further defense, that's
10 everything on --

11 THE COURT: Hold on.

12 MR. BARMEN: I'm sorry. Whoever that was broke up.
13 I didn't hear it.

14 MR. McELFISH: I can cross-examine on the context of
15 the notes?

16 THE COURT: Well, you want her notes to come in, Mr.
17 Barmen?

18 MR. BARMEN: Well, we have a subpoena out on the
19 doctor, and certainly we would introduce the notes to her at
20 the time. And if we're calling her in our case, we would be
21 directing her and I would certainly think that Ray would then
22 have the opportunity to cross-examine her.

23 THE COURT: How do we not bring in TBI and PTSD
24 then?

25 MR. BARMEN: Well, if we have to redact certain

1 things because if the notes that talk about the bus trips,
2 Your Honor, there's just two separate notes. One was a couple
3 of weeks after the accident, and one was in I believe July of
4 the same year so that we're looking at -- well, the first trip
5 was still in '13, I believe, and the second trip was June or
6 July of '14. So it would just be [indiscernible] redacted.

7 THE COURT: Well, be careful they're not open --

8 MR. BARMEN: Understood.

9 THE COURT: Well, you're not going to open the door
10 because the first jury found that he doesn't have TBI or PTSD,
11 but still, this jury hearing about that will confuse them.
12 And I don't think you want them to be confused.

13 MR. BARMEN: Understood. Thank you. And Steven,
14 unless I'm -- that's everything on my list. Steven? Rob?

15 MR. SAAL: Tom? Brad? Do we --

16 MR. BARMEN: Is there something in our list?

17 MR. SAAL: Brad, did we want -- I apologize.

18 MR. McELFISH: [Indiscernible]. I mean, Judge, why
19 can't we just consider a stipulation on that? Do we need Dr.
20 Goldman to --

21 THE COURT: Well, if you want to stipulate, if you
22 want to come up with factual stipulations, that's fine.
23 Anything that will make it less time-consuming is great.

24 MR. McELFISH: All right.

25 THE COURT: But if the defendants won't agree to a

1 stipulation, then they're entitled to call her.

2 MR. BARMEN: Well, I'm not going to commit right
3 now, but I will say I'll talk to my team about it. I'll let
4 Ray know.

5 UNIDENTIFIED SPEAKER: Brad, do we want to discuss
6 Mr. Provder before we moved on?

7 MR. BARMEN: Oh, yes. Yes, thank you. Your Honor,
8 Mr. McElfish has identified Edmond Provder as one of his
9 witnesses. Mr. Provder was their life care planner.

10 THE COURT: Uh-huh.

11 MR. BARMEN: And he's the one that talked about he
12 needs X, Y, and Z in the future. Well, the jury already
13 determined all that stuff. I don't think Mr. Provder adds
14 anything new or is relevant [indiscernible].

15 THE COURT: And this applies to Ms. Cummings, also?

16 MR. BARMEN: Correct. We only listed Ms. Cummings
17 on rebuttal if necessary to permit Mr. Provder to testify
18 which, frankly, we don't think he should because this is pain
19 and suffering. He's a doctor, and he can't talk about any of
20 the medical stuff. All he could testify to is what he's going
21 to need in the future. That's already been determined. But
22 if he's permitted to testify, then we would need Ms. Cummings.

23 THE COURT: And why do you need Mr. Provder, Mr.
24 McElfish?

25 MR. McELFISH: I just need to figure out -- because

1 you didn't want me to talk earlier about what this jury's
2 going to know about what the first jury did. So I'm just
3 trying to line up ways that this jury can know what the first
4 jury did. If you want to talk about what you're going to tell
5 the second jury, maybe we don't need Mr. Provder, but I need
6 to get it in some way if you don't tell them what the first
7 jury found. And you told me I don't want to talk about that
8 right now, and I respect that. But I'm trying to -- if I knew
9 what the first -- if I knew what the second jury was going to
10 be told about what the first jury did, I could cull down my
11 witness list pretty good probably.

12 THE COURT: And what do you want to tell the second
13 jury about what the first jury did?

14 MR. McELFISH: Just what the findings were in terms
15 of the medical care that's needed, not the amounts or
16 anything, just the past medical care and the future medical
17 care. Then I don't need Provder to explain it.

18 MR. BARMEN: And in prior papers, Mr. McElfish and
19 the Rule 16, Mr. McElfish wants to tell the jury, this new
20 jury the compensatory damage award and the punitive damage
21 award, which is highly improper for any number of reasons. So
22 I'm all for paring things down if we can, but whether things
23 are pared down or not, to us there's absolutely no reason for
24 the life care people to testify when all that stuff's already
25 been determined. It's not in dispute.

1 MR. McELFISH: Judge, I don't think any amount
2 should be given to the jury. I don't think any amount from
3 the first trial, whether it's good for me or bad for me,
4 should be given to the second jury. But as to liability, they
5 should know that there's liability. As to causation, they
6 should be told what the first jury found. As to medical care,
7 they should be told what the first jury found. And then let
8 them decide pain and suffering so they have context around
9 what they're deciding. I don't think the amounts are needed.

10 MR. BARMEN: Ray, are you now dropping your request
11 that this jury be told that the first jury found punitive?

12 MR. McELFISH: I just said what I'm requesting.

13 MR. BARMEN: Yeah, yeah. But I want to make sure
14 we're clear because --

15 THE COURT: Okay. I will --

16 MR. BARMEN: -- you say things and it's open to
17 interpretation.

18 THE COURT: I will figure out what the first -- what
19 the second jury will be told. And I am almost certain that
20 Mr. Provder and Ms. Cummings will be excluded because they
21 will not be necessary.

22 MR. McELFISH: Right. So what I was going to say is
23 once I know that, it doesn't have to be now, it can be
24 obviously the day before trial, if it's clear that the jury
25 knows that the treatment is awarded or what it was that he was

1 given, then clearly I don't need him to come in and say it.

2 And I can adjust at that moment.

3 THE COURT: Okay.

4 MR. McELFISH: I don't need to know now.

5 THE COURT: All right.

6 MR. BARMEN: Your Honor, and I appreciate that and I
7 think that's good for everybody, but on this issue of punitive
8 --

9 THE COURT: I'm not going to tell --

10 MR. BARMEN: -- if Mr. McElfish --

11 THE COURT: I'm not going to tell the jury what the
12 punitive damage award was.

13 MR. BARMEN: But is the jury going to be told that
14 we were liable for punitive? I don't think that's in any way
15 appropriate or relevant to pain and suffering. It has nothing
16 to do with the guy's physical injuries and the pain he
17 suffered.

18 THE COURT: I'll have to think about that. You'll
19 find out. I'm looking at these -- all these papers and trying
20 to find -- there are other things that are mentioned that we
21 haven't discussed yet.

22 MR. McELFISH: So the Brookdale Hospital records,
23 these so-called, and excuse me for this, and quote "a blown
24 condom" -- not, the "ruptured condom" event, I'm just trying
25 to the best of my ability remove the prejudice of this. And

1 I'm okay if they cross him with you went to the hospital for
2 sex-related issue when you said you couldn't have sex. But
3 blown condoms, STDs are not -- they're prejudicial. They're
4 not relevant.

5 MR. BARMEN: And, Your Honor, if you recall the
6 first time, the first trial, he redacted the specific stuff
7 relative to the STDs.

8 MR. McELFISH: Right. But they didn't redact "blown
9 condoms," though.

10 MR. BARMEN: I don't know how that's prejudicial,
11 but, you know, it's not up to me. The issue here is that
12 plaintiff's credibility. He testified in deposition in no
13 uncertain terms he was unable to have sex post-accident
14 because of the pain. Well, we know that's not true based on
15 the records. So it's another instance of him lying this time
16 under oath because what he testified to is inconsistent with
17 what's in his medical records.

18 We would only use it for that purpose, and it would
19 be used exactly the same way in this trial as it was the first
20 trial with the STD stuff redacted.

21 MR. McELFISH: I think they can ask him if he went
22 to the hospital for a sex-related issue at a time when he said
23 he couldn't have sex, and he can answer. But to show the jury
24 about ruptured condoms, I'm not following --

25 THE COURT: Well, that's not -- I don't think that's

1 the way they'll ask the question.

2 MR. BARMEN: Right. And here's --

3 MR. McELFISH: That's the way they did it in the
4 first trial. They showed the jury the document, and it was
5 too late. It was already up.

6 THE COURT: Yes, but this --

7 MR. McELFISH: They showed the jury the ruptured
8 condom language.

9 THE COURT: But this is the second trial, and
10 they're going to say --

11 MR. McELFISH: Right.

12 THE COURT: -- didn't you lie to the jury in the
13 first trial --

14 MR. McELFISH: Right.

15 THE COURT: -- by saying you couldn't have sex but
16 yet you were going to the hospital for a ruptured condom.

17 MR. BARMEN: Right. And there's a problem, Your
18 Honor, and Ray and I have discussed this previously in an
19 effort to try and resolve this amongst ourselves. The problem
20 with doing it the way Mr. McElfish wants to do it is, you
21 know, without showing any of the records or have a proper
22 context of what happened here, understanding that it is for
23 credibility issues, if we don't have the records and they say,
24 well, you went to the hospital for sex-related issues, the
25 implication there or the way they come back on that is by

1 saying -- is putting in the jury's mind that it was because of
2 the pain that he couldn't function or ended up in the
3 hospital.

4 THE COURT: Well --

5 MR. BARMEN: The records are important because they
6 go directly to impeaching what he said or what he testified to
7 under oath.

8 THE COURT: It all depends --

9 MR. McELFISH: We never --

10 THE COURT: To me, it all depends on how and what
11 question you ask and how he answers it because he may answer
12 it in a way based on the question you asked that is truthful
13 that you don't need to show him the records.

14 MR. BARMEN: No, of course. If he admits this time
15 that he lied last time, then we move on.

16 THE COURT: So I'm not going to exclude them. It
17 all depends on how it plays out as to the Brookdale Hospital
18 reports.

19 MR. BARMEN: Understood.

20 THE COURT: Then the next -- I guess the next thing
21 is Claxton-Hepburn records. MR. McELFISH: Yeah. Most
22 of those records were related to headache that they tried into
23 wrap in to the head injury case which is out. The issue I
24 wanted to focus in on is that the back pain that's related to
25 the pneumonia, I guess we could just explain like we did in

1 the last trial. But I think that it's not a bona fide -- it's
2 not bona fide back pain. In other words, it's clear that this
3 is only pain related to pneumonia. That's what he was treated
4 for.

5 So I'm asking that that visit and those complaints
6 be excluded because it's not a bona fide lumbar injury. If it
7 was, I would understand admitting it.

8 THE COURT: These are records that pre-date the
9 accident, yes?

10 MR. McELFISH: Correct.

11 MR. BARMEN: Correct.

12 THE COURT: So didn't the jury -- well, I was going
13 to say didn't the jury sort of they were not compelled by them
14 because they found that he had an injury that was either
15 caused or exacerbated by the accident.

16 MR. McELFISH: Correct.

17 THE COURT: But I guess, Mr. Barmen, you'd say,
18 well, no, they did because they found -- they gave him such a
19 low amount for pain and suffering. It's because he had a
20 preexisting back injury.

21 MR. BARMEN: That is right on point, Your Honor.
22 And with both Brookdale and Claxton as it relates to things
23 after the accident, there's relevant information in those
24 records as well because when he went in for, for example, the
25 sexual -- when he went in for there, they still work him up

1 for a full history. And there's notes in there.

2 THE COURT: They deny his back.

3 MR. BARMEN: So right, denying back pain, denying
4 this, denying that. Those things are relevant as well.

5 THE COURT: Okay. They can come in. Lattuga's
6 report?

7 MR. BARMEN: And this is -- Your Honor, can I speak
8 to that or do you want to --

9 THE COURT: Go ahead.

10 MR. BARMEN: -- Mr. McElfish first? Lattuga's
11 report was admitted in evidence the first time. Dr.
12 [indiscernible] relied heavily on Dr. Lattuga's report. And
13 recall Dr. Lattuga issued or submitted a multiple-page report
14 saying I treated Bauta from so-and-so to so-and-so when it
15 turns out that --

16 THE COURT: He did.

17 MR. BARMEN: -- not only did he never treated him,
18 he'd never met him. So their primary expert, Dr. Mobin relied
19 on a fraudulent report by Lattuga that was signed under
20 penalty of perjury. And that's certainly relevant to any
21 number of things but certainly, Dr. Mobin's opinion.

22 MR. McELFISH: Well -- are you done?

23 MR. BARMEN: Well, no, actually, I have one more
24 thing. I mean Mr. McElfish --

25 MR. McELFISH: You don't need to think, Mr. Berman,

1 if I ask you if you're done.

2 MR. BARMEN: No, no. I had one more thing, Ray. I
3 was just collecting my thoughts. Mr. McElfish on this call
4 has indicated things that were admitted in the first trial as
5 exhibits are fair game in this trial. Lattuga's report was an
6 exhibit in the first trial. Now I'm done.

7 MR. McELFISH: Well, it wasn't -- okay, if the only
8 purpose -- if the only -- by way of offer of proof, if the
9 only purpose of using this report is to establish that Mobin
10 relied upon a fraudulent report, that whole issue flamed out
11 big time in the first trial because Dr. Mobin said I have no
12 idea. And then they threaten repeatedly to bring Dr. Lattuga
13 in and prove to the jury that their main surgeon was a fraud,
14 that never happened.

15 So in this case, this trial, I don't see how they
16 can go beyond what they asked Dr. Mobin who is going to say I
17 don't know. I mean I have what I have, I read what I read.
18 And anything beyond that is hearsay because Lattuga never
19 testified. So I'm not sure where they're going to get all the
20 firepower from.

21 MR. BARMEN: Well, then withdraw your objection if
22 it's no big deal and you can clean him up with Mobin just the
23 way you said. Then what is the big deal?

24 MR. McELFISH: I'm not going to withdraw --

25 MR. BARMEN: We want to use -- we want to use it.

1 We believe it's relevant. We believe it goes to the
2 credibility of your case and your expert. It was admitted as
3 an exhibit in the first trial. And if it's no big deal, then,
4 Ray, it's no big deal.

5 MR. McELFISH: I don't think it was admitted into
6 evidence.

7 MR. BARMEN: It was.

8 MR. McELFISH: Oh,

9 MR. BARMEN: It was.

10 MR. McELFISH: It's 403 all the way. I mean it
11 doesn't have -- if they brought Lattuga in in the first trial
12 and they proved up this fraud as they call it, then we'd be
13 talking a different story. But because it's [indiscernible]
14 out in the first trial, they want another shot at it here.
15 They shouldn't get it for this limited scope.

16 THE COURT: I guess the question becomes is Dr.
17 Lattuga's report relevant to whether Mr. Bauta has past or
18 future pain and suffering related to his lumbar spine.

19 MR. McELFISH: Right. The answer is it's not, and I
20 can explain why.

21 THE COURT: Or if it is relevant, it is unduly
22 prejudicial. So you're saying it's not relevant why.

23 MR. McELFISH: Right. So it's not relevant because
24 for a couple of reasons. Number one, if you recall, Dr.
25 Lattuga was originally going to be an expert witness, and that

1 was a report written as an expert and a treating doctor. He
2 was replaced by Dr. Mobin who does not rely upon Dr. Lattuga's
3 report as an expert. Dr. Mobin relies upon the records of --
4 primarily the records of Dr. Cordial which are different than
5 Dr. Lattuga's report.

6 Dr. Lattuga only claims to have seen Mr. Bauta like
7 in the very initial stages of when he went New York Spine.
8 He's been there many, many times. Dr. Mobin forms his opinion
9 based upon the -- you know, the time line of medical records
10 from the beginning to the end and his background training and
11 experience and the MRI. So he doesn't in any way rely upon
12 the Lattuga report and neither does Dr. Cordial. He's a
13 treating doctor and he can testify based upon his own records
14 and what he did to the man.

15 THE COURT: Mr. Barmen, last word?

16 MR. BARMEN: Thank you, Your Honor. I'm shaking my
17 head at some of the things that were just said. I mean the
18 record is so inconsistent with what was just said. Mr. -- Dr.
19 Mobin and Dr. Lattuga were both initially identified as
20 experts for the plaintiff. Dr. Mobin didn't replace Dr.
21 Lattuga. Dr. Lattuga was designated as an expert when we
22 determined through deposition that his report was fraudulent,
23 that he never treated him, never met him.

24 Dr. Mobin did testify in deposition that he relied
25 on Dr. Lattuga's report. It was only after Lattuga was

1 withdrawn and the issue with the report came to light that
2 Mobin had changed that on the stand at trial and downplayed
3 his reliance on Lattuga's report which is wholly inconsistent
4 with his deposition testimony which goes to his credibility
5 and the credibility of an expert is always at issue, always.

6 And, again, this was admitted the first trial.

7 THE COURT: Yes, I [indiscernible].

8 MR. BARMEN: And as Mr. McElfish pointed out early
9 on, prejudicial is not the standard. Unduly prejudicial, the
10 risk of the probative value being substantially outweighed by
11 undue prejudice. These were the people they relied on. This
12 is a report that Mr. McElfish requested and paid for. And it
13 wasn't until the lie was exposed that it was withdrawn, and it
14 wasn't until that was exposed that Mobil changed his position
15 on what he relied on in forming his opinion.

16 Everything Mr. McElfish just said, he can certainly
17 put on at trial when we go down this road with Mobin. But the
18 testimony back and forth on it is relevant to his credibility,
19 the strength of his opinions which ultimately goes back to the
20 aggravation versus causation issue. It's all fair game or it
21 should be.

22 THE COURT: I'll allow it. Okay. Next issue,
23 Medicaid and Emblem Health records. What do you need those
24 for, Mr. Barmen?

25 MR. BARMEN: Steven, you want to take that one?

1 MR. SAAL: Yes, Your Honor. Mr. Saal here. We
2 listed these as exhibits mainly in response to without knowing
3 what Mr. McElfish's case is going to be on the extend of
4 treatment that was provided to Mr. Bauta, reasonableness of
5 treatment, the extent of the treatment. And these records
6 were just relevant to giving the context of the treatment that
7 Mr. Bauta had undergone as a result of his alleged injuries.

8 So it's basically something that we listed as we
9 will -- if we need to respond to Mr. McElfish at trial, but
10 basically it's something reserved for response at this point.

11 THE COURT: They're likely to be excluded unless
12 they become relevant based on the plaintiff's case. And I'd
13 serious doubt they will be because we're going to instruct the
14 jury, inform them of what the first jury found and that should
15 clear everything up.

16 MR. SAAL: Yes. Thank you, Your Honor.

17 THE COURT: Delayed onset, I guess this is an issue
18 that deals with causation.

19 MR. McELFISH: Yes.

20 THE COURT: Again, I don't know how we can escape
21 this jury answering the question is it -- was it caused by or
22 was it exacerbated by?

23 MR. McELFISH: Because -- I didn't hear any case
24 citations or anything specific from Mr. Ortiz. Maybe I'm
25 missing something. I'll admit it. I don't know the

1 difference between caused by or exacerbated by in terms of
2 damages only. I understand the difference causation-wise, but
3 the jury decided it was one or the other. So I'm still not --
4 I mean you ruled. So you ruled so what am I supposed to do?

5 THE COURT: It's -- well --

6 MR. McELFISH: But I don't see how you -- I mean
7 it's more of an apportionment issue, but they didn't -- you
8 know, they weren't asked to apportion. That's the problem.

9 THE COURT: So then what do we do with it? If we
10 have a problem that we didn't collectively --

11 MR. McELFISH: That's what I was trying to say in
12 the beginning and you didn't want me --

13 THE COURT: No.

14 MR. McELFISH: -- to go any further with it.

15 THE COURT: No, that's not what -- no, that's not
16 what you tried to say in the beginning. What you tried to say
17 in the beginning was about what we should tell the jury about
18 medical treatment that the first jury awarded.

19 MR. McELFISH: No, you shut me down. I'm sorry to
20 interrupt. You shut me down when I tried to tell you what I
21 thought you should tell the jury about causation. And that's
22 really --

23 THE COURT: That's so not true.

24 MR. McELFISH: -- if you don't mind me saying so --

25 THE COURT: That is so not true.

1 MR. McELFISH: -- what the jury should know --

2 THE COURT: That's so not true.

3 MR. McELFISH: -- is that the first jury found
4 either causation and/or exacerbation and --

5 THE COURT: So what? So what? So what from that?
6 What flows from that, Mr. McElfish?

7 MR. McELFISH: What flows from that is because the
8 first jury was not asked to apportion it, and this jury's only
9 being asked for pain and suffering damages, again, it doesn't
10 matter. It was either one or the other. Why did they have to
11 now apportion it?

12 UNIDENTIFIED SPEAKER: Because they're going to --

13 THE COURT: Oh my god. It's like -- don't even
14 answer him. I'll answer him.

15 UNIDENTIFIED SPEAKER: Okay.

16 THE COURT: It's very simple, very simple. You have
17 someone with degenerative back who's in a lot of pain, right?
18 Daily pain, they can't sit for a long period of time. They
19 can't stand for a long period of time. They're hurting so
20 much. They get into a car accident, and now they need
21 surgery. So you're saying the person driving that other car
22 is responsible for all of the pain, the pain that pre-existed
23 and the pain, additional pain caused by the surgery and going
24 forward?

25 There's no difference, right? Of course, there is.

1 There's a huge difference. You're liable, but you're only
2 liable for the damage that you cause. And if it's -- you
3 exacerbated it, you're liable for the exacerbation. If you
4 caused all of it, you're liable for all of it. You're
5 responsible for all of it.

6 And we made the mistake, and I'll take the blame for
7 this, of not asking the jury, we should have had two
8 questions. Did the accident cause his injury, yes or no? If
9 you answer no, go to the next one. Did it exacerbate his
10 injury, yes or no? If it exacerbated, then you get damages
11 for the exacerbation, not for all of it. Or is the law that
12 -- I don't think it is, but is it that if you exacerbate,
13 you're responsible for everything?

14 MR. McELFISH: But that's -- wait a second. That's
15 exactly my point is that if this was their question, this was
16 their interrogatory -- and you can take the blame for it,
17 Judge, but they're the ones that submitted it. And now they
18 want to apportion it. They want to go back and do what they
19 should have done the first time. That's exactly my point.

20 THE COURT: Yes.

21 MR. McELFISH: There may have been a difference had
22 they done it right.

23 THE COURT: So --

24 MR. McELFISH: -- but they didn't.

25 THE COURT: Okay. All right. So they didn't do it

1 right the first time.

2 MR. McELFISH: Now they want another bite, right.

3 And I'm saying no.

4 THE COURT: And if it's still wrong, it's wrong.

5 And if it goes to the circuit, we have a second trial that we
6 don't apportion it, they'll figure it out. It's still wrong.

7 And then it goes to the circuit because this case is going to
8 the circuit. And no one's going to see a penny for another
9 couple of three years because you're going to have post-trial
10 motions after the second trial, right? And then it's going to
11 go to the circuit and the circuit's going to say, hey, you
12 guys got it wrong. Do it over again. How does that work for
13 any of us? I want --

14 MR. McELFISH: That's the point, Your Honor.

15 THE COURT: I want this done before I retire, and I
16 retire in 13 years. At the rate we're going, we're probably
17 going to have Bauta 3, 4, and 5. So let's get it right.
18 Look, we're going to look -- we're going to look at this
19 issue.

20 MR. McELFISH: Okay.

21 THE COURT: Let's look at this issue. Under the
22 law, is it caused by or exacerbated by, is there a difference?
23 And if there is a difference, we're going to tell this jury --
24 if there is no difference, if Mr. McElfish is right, then the
25 jury doesn't need to hear any of this, just what are his

1 damages.

2 If it is a difference between cause or exacerbated,
3 we're going to make this -- have this jury figure that out,
4 and they have to pick one or the other because it's not a
5 question we ask the first jury.

6 MR. McELFISH: Now, maybe I would suggest that we
7 can brief that.

8 MR. ORTIZ: Your Honor, I don't even think you need
9 to. I mean honestly -- it's Rob Ortiz -- if you look at your
10 own charge, if you look at the PJI, under 2:282 just for
11 reference --

12 THE COURT: Hold on. Hold on. Hold on.

13 MR. ORTIZ: Sure.

14 [Pause in proceedings.]

15 THE COURT: What was that, Mr. Ortiz, 2 what?

16 MR. ORTIZ: 2:282 which is damages, personal injury,
17 aggravation of pre-existing injury.

18 THE COURT: Yeah.

19 MR. ORTIZ: Okay. And if you look at the comments,
20 it has all the case law there explaining -- it has the charge
21 which is, if I recall, this is what we asked for and what you
22 incorporated into the charge to the jury as well. And, you
23 know, where it states wrongful act does not cause the
24 condition, injury, or illness but only aggravates and
25 increases the severity of a condition existing at the time of

1 the injury. The plaintiffs may recover only for such
2 increased or augmented suffering or damage as are caused by
3 the defendant's act citing Ortiz -- no relation -- v.
4 Mendolia, 116 A.D.2nd, 707 (Second Dept. 1986). And you have
5 a bunch of cases there.

6 I mean, you know, to the extent that we're talking
7 about the differentiated verdict sheet, I hazard to guess that
8 this verdict sheet was as differentiated as anyone's ever
9 seen. We had line items for everything, and we had separate
10 line items for, you know, cervical versus lumbar versus TBI
11 and the other thing. And I don't frankly think anyone was
12 going to go for separate items because the thing is the issue
13 was are you going to recover and he -- you know, if it was
14 caused or exacerbated, he's entitled to recover. But you're
15 going to charge them that what they determine is going to
16 affect the amount that they award. And that's why, in our
17 view, they awarded what they did, which is a very small
18 number, 36,5, and then zero.

19 So, you know, I think that it's important here to
20 know it. I think that it's important to know why because it's
21 going to be a guide for Your Honor to look at this in terms of
22 CPLR 5501(c) for material deviation once this verdict is done.
23 And, you know, what we know is that the jury did not throw out
24 Mr. Bauta in connection with the lumbar injury. They threw
25 him out on everything else. They didn't throw him out on a

1 lumbar injury.

2 And we know that it either was, as we know,
3 [indiscernible] caused or exacerbated, but we know which. It
4 wasn't an error. I think that we are now at a new trial where
5 that's the only issue. He is not getting nonsuited, and it's
6 informative to the Court and to the parties to know which one
7 they believe. You've already allowed the proof in on it in
8 terms of, you know, what we're going to say is that it's an
9 exacerbation because it pre-existed. And Ray's going to argue
10 -- Mr. McElfish is going to argue that it's not, that it's all
11 from the bus. And they're going to believe it or not.

12 And based on what they do, if they say it's an
13 exacerbation and they give the guy \$5 million, then we know
14 right away that that is excessive under the material deviate
15 standard under 5501(c) of the CPLR. And that'll aid you in
16 your remittitur, in your decision of our remittitur
17 application, you know. So that's where it is. This is not
18 harming anyone.

19 And you're going to tell the jury, I believe, from
20 what I've heard on this call that there was a prior trial and
21 that it's already been determined that Mr. Bauta either
22 sustained the lumbar injury from the bus accident or it was
23 exacerbated. They'll have to decide which one based on the
24 evidence that's presented by the parties, and their award is
25 going to be guided by that determination because, you know,

1 our position would be that you should charge them the way you
2 did in the prior trial with 2:282.

3 I mean I know you adapted the wording a little, but
4 that's basically what you charged them. And that's the charge
5 that -- I apologize, I didn't have the docket number, but it's
6 what you did in the charge that you delivered to this jury,
7 the first jury.

8 MR. McELFISH: Here's the problem, Judge, is whether
9 Mr. Ortiz is right or wrong, this was an issue that should
10 have been raised with the first jury and based on the case law
11 I'm looking at, generally speaking, if these things are not
12 raised, they're waived. Then what happens is they don't
13 raised it in post-trial motion. They lump it all together in
14 the first case. Then they don't raise it in the post-trial
15 motion. The Court rules that there's a retrial just on pain
16 and suffering damages only for compensatory. And now for the
17 first time, they want to go back and basically retry causation
18 and sparse it out.

19 MR. ORTIZ: That's not what we're saying, Your
20 Honor. By any stretch of the imagination and not for nothing,
21 it was raised in the prior trial. You charged the jury with
22 it. You charged --

23 MR. McELFISH: But not the apportionment.

24 MR. ORTIZ: No one is apportioning -- right, no one
25 is apportioning a percentage to prior -- it's either/or. It's

1 either/or. And the jury found, you know, one way or the other
2 because that's what they needed to do here, what we're -- I
3 don't understand what you're saying we're -- we're not saying,
4 is it 50 percent or 40 percent. It's one or the other. And
5 what that does is it governs the amount of the award for
6 purposes of review. But, you know, we're talking about --

7 MR. McELFISH: I think this should be briefed.

8 MR. ORTIZ: -- we're talking about many different
9 things, you know. You're saying whether I'm right or wrong.
10 I'm not wrong. I'm telling you what the law is in New York.
11 This is what I've given the Court the citation.

12 MR. McELFISH: You've been wrong.

13 MR. ORTIZ: I'm not wrong.

14 MR. McELFISH: You've been wrong.

15 THE COURT: Okay. Okay.

16 MR. ORTIZ: But I think it's --

17 THE COURT: Okay. Okay.

18 MR. ORTIZ: -- [inaudible] in my life, sure.

19 THE COURT: All right.

20 MR. ORTIZ: I've been wrong in my life, Ray. Not in
21 this case.

22 THE COURT: Well, all right. If you want to send in
23 a letter brief, Mr. Elfish, on this issue, that's fine. And
24 if the defendants want to respond to it, that's okay as well.
25 I'm intending -- I mean I think there are a number of mistakes

1 that have been made in this case by all involved. And I'm
2 trying my best to clean everything up so that you can move on
3 to the next level and have a meaningful and full discussion of
4 all these issues and resolution, which may result in a third
5 trial.

6 I hope it doesn't, but it may. So delayed onset,
7 it's still part of the case. What is not part of the case is
8 whether the injury that the first jury found Mr. Bauta to have
9 is either caused by or exacerbated by this accident. He is
10 going to get money. He is going to get more money than the
11 first jury gave him because they did not give him enough.

12 MR. ORTIZ: I'm sorry, Your Honor, I just didn't
13 understand. Are you saying that we are not asking them if it
14 was caused or exacerbated and that you are not going to charge
15 them on that?

16 THE COURT: No. I -- that's not what I said.

17 MR. ORTIZ: Okay, I apologize. Sorry, I just
18 [indiscernible].

19 THE COURT: I have to figure out how we're going to
20 do it, whether it's in the form of a special verdict sheet.

21 MR. ORTIZ: Yeah.

22 THE COURT: Or whether it's just encompassed in the
23 charge itself.

24 MR. ORTIZ: In all honesty, I've already drafted a
25 draft, prepared a draft verdict sheet which actually asks the

1 question, you know, check a box, is it cause or was it
2 exacerbated by. And then it goes to the next question and the
3 amount of damages. And then --

4 THE COURT: Well, you don't necessarily have to do
5 that. You could -- or maybe -- there are different ways of
6 doing it, but I haven't figured it out. If you want to submit
7 something, go ahead and submit it.

8 MR. ORTIZ: Sure.

9 THE COURT: Mr. McElfish, if you want to brief this
10 issue, go ahead and brief it. That's fine. You each can
11 respond to whatever the other side submits. As long as I have
12 it sufficiently in advance of the trial, I don't care. You
13 give it to me at least four days before the trial, that's
14 fine. I think we have other issues though as far as the
15 evidence is concerned and what should or should not be
16 permitted.

17 I'm looking at Mr. McElfish's May 18th letter. I
18 think all of those issues are dealt with, have been dealt
19 with. You filed -- wait a second. Provder and Cummings,
20 that's done. Lanigan, Gautheir, that's done. Photographs of
21 family, of plaintiff and the family, what is the relevance of
22 -- I know they were part of the first trial, right?

23 MR. McELFISH: Yeah.

24 THE COURT: I know they were marked. They were
25 marked, but they weren't admitted.

1 MR. McELFISH: I don't intend to offer it, Judge. I
2 don't intent to offer it.

3 THE COURT: Okay. Those are out. Greyhound's no-
4 fault records denying no-fault coverage?

5 MR. McELFISH: I don't intend to offer it. I said
6 that in a letter from me.

7 THE COURT: Oh, okay.

8 MR. McELFISH: I told them that, too.

9 THE COURT: Harm to other passengers.

10 MR. McELFISH: I don't intent to offer it.

11 THE COURT: Okay. Punitive damages, that's out.
12 What else is there, anything that I'm missing?

13 MR. BARMEN: Everything that -- this is Barmen.
14 Everything on my list, Your Honor. Steven, is there something
15 we forgot to cover or didn't cover?

16 MR. SAAL: No, I believe that that completes our
17 issues. Your Honor, you said that the punitive -- the whole
18 mention of punitive damages is out? Is that what the Court
19 just said? I didn't hear that.

20 THE COURT: Yes, but -- yes. One thing you could do
21 to avoid all of this is to let me decide the damages and see
22 if the circuit will buy that.

23 MR. SAAL: Say that again.

24 THE COURT: All right. Remittitur is permitted,
25 correct?

1 UNIDENTIFIED SPEAKER: Yeah.

2 THE COURT: Additur is not?

3 MR. McELFISH: That's the one thing federal judges
4 don't get and the states do.

5 THE COURT: Well, I mean, to be fully honest, we
6 try. We really thought about it long and hard. Artis [Ph.]
7 who is the law clerk during the trial stayed and wrote and
8 helped me write the decision on the post-trial motions. And
9 we really wanted to do that, but we didn't think it would pass
10 muster with the circuit. But --

11 MR. BARMEN: Yeah, we tried to give you the tools
12 for it, but we understand.

13 THE COURT: Well, the reason why it doesn't work is
14 because it potentially impacts the plaintiff, right, and --

15 MR. McELFISH: Well, it's a constitutional issue,
16 Seventh Amendment.

17 THE COURT: Can't you -- you can waive that, can't
18 you?

19 MR. McELFISH: Yeah, you can do -- we put this in
20 our papers. You can do a conditional additur and then if we
21 choose to take it, we can waive it. That would waive the
22 constitutional violation. We can waive that by accepting a
23 conditional additur. That's a Gasperini case of the U.S.
24 Supreme Court.

25 THE COURT: But it's still unclear whether -- well,

1 if you accept it, then -- if you waive it, then how is the
2 circuit going to get it, right? The circuit would never deal
3 with the issue.

4 MR. ORTIZ: They would get it if we didn't agree
5 with your additur.

6 THE COURT: Correct.

7 MR. ORTIZ: And we appealed.

8 MR. McELFISH: If either one of us don't agree with
9 your additur, the circuit would get it.

10 THE COURT: Do you want to -- you want me to -- not
11 now, but would you within the next few days give you proposed
12 numbers and see if you agree with them?

13 MR. BARMEN: Your Honor, this is Barmen. We would
14 have to speak with Mr. Patuccucci to see where he came down on.
15 I don't think that's -- frankly, for me, it's an interesting
16 idea, and it's actually something Ray and I discussed some
17 time ago.

18 MR. McELFISH: It was actually something I proposed
19 some time ago.

20 MR. BARMEN: Yeah. Right. And I told you at the
21 time I thought it was an interesting idea. But that's not
22 something that I think on the defense side can commit to
23 without talking to the person who's responsible for writing
24 the check.

25 THE COURT: Well, you wouldn't be writing the check

1 immediately, right?

2 MR. BARMEN: No, but I mean even to say, Your Honor
3 -- I mean I guess if Your Honor wanted to in a couple of days
4 circulate numbers and say, here, here's what I think it's
5 worth, tell me what you think, that's one thing. But I
6 certainly can't commit on behalf of Greyhound and the insurer
7 to just, you know, accept to walk down that road right now
8 without having approval to do so.

9 MR. McELFISH: It would certainly temper post-trial
10 motions if there's a verdict.

11 MR. BARMEN: Well, look as I said --

12 MR. McELFISH: Because then we'll know where he's
13 at.

14 MR. BARMEN: I said it's an interesting idea, and
15 I'm not against it personally. But I need to get approval
16 before we could do all that and come on, Judge?
17 [Indiscernible] misses us and wants to come in for two weeks.

18 MR. McELFISH: I can't believe it's been a year,
19 Judge.

20 THE COURT: Yeah.

21 MR. BARMEN: Rob, this is something we need to
22 discuss, but --

23 MR. ORTIZ: Yeah. And --

24 MR. BARMEN: -- [inaudible].

25 MR. ORTIZ: Yeah.

1 MR. McELFISH: Judge, I have an issue before we get
2 off the phone once you're done with this.

3 THE COURT: Okay.

4 MR. McELFISH: So let me know when you're ready.

5 THE COURT: Go ahead.

6 MR. McELFISH: I'm a little embarrassed to bring
7 this up and maybe this is not something you want to deal with,
8 but I'm going to bring it up since we're on the phone, is I've
9 had, you know, what I do for a living out here is I try cases.
10 That's all I do. And a lot of state court judges have granted
11 motions to continue based on the federal engagement order
12 which you were kind enough to sign. But I do have one
13 remaining court that is not wanting to do that. And he's
14 trying to engage me before this trial starts, and I don't know
15 what to do. I'm losing sleep. Orange County in California.

16 I'm going to go in on another motion Thursday and
17 ask him one more time. Well, I can't be in two places at
18 once.

19 THE COURT: When is he saying you have to be there?

20 MR. McELFISH: I'm going to go in on Thursday for a
21 motion that he's saying that the trial needs to start on 5/28.
22 And the problem with all of this is that they had --- the
23 defendants in that case had prior lawyers that stipulated to
24 move to trial to late June or July, I can't remember. And
25 then Murchison & Cumming is a big firm out here in L.A., came

1 in and said no, we don't agree to any of that. We want to
2 start on May 28th. And so far, the judge is holding my feet
3 to the fire.

4 THE COURT: How long of a trial is it?

5 MR. McELFISH: It'll go into this for sure. It'll
6 go two or three weeks. It's called [indiscernible], Naomi
7 [indiscernible].

8 THE COURT: I don't know what to tell you, Mr.
9 McElfish.

10 MR. McELFISH: I don't know either. What happens if
11 he engages me and I'm not there? I guess I'm not there.

12 THE COURT: Well --

13 MR. BARMEN: Mr. Kieffer can try it. He's well --
14 he can try it with --

15 MR. McELFISH: Yeah, yeah. Brad, come on.

16 THE COURT: You have to -- I mean what --

17 [Pause in proceedings.]

18 MR. SAAL: Are we still there?

19 THE COURT: Yeah.

20 UNIDENTIFIED SPEAKER: Yeah, I'm here.

21 MR. SAAL: Sorry, I thought everyone -- my
22 apologies.

23 [Pause in proceedings.]

24 THE COURT: I wouldn't be able -- if we move our
25 trial --

1 MR. ORTIZ: How long is our trial going to be?

2 THE COURT: Two weeks.

3 MR. McELFISH: Two weeks.

4 MR. ORTIZ: Two weeks in total?

5 THE COURT: Yes. That's all I've given you. Maybe,
6 maybe, maybe starting July 22nd.

7 MR. ORTIZ: Your Honor, I mean for this to be
8 brought up at this late date, we've got experts lined up. I
9 mean --

10 THE COURT: Look, I understand that. But, you know,
11 if another judge is being difficult, it's either Mr. McElfish
12 jettisons that case, gets another lawyer who has to handle it,
13 you know, on the fly or we move our case. He can't be in two
14 places at once.

15 MR. ORTIZ: And, look, I get that and I've been in a
16 situation and I'm certainly sensitive to it. But now you're
17 considering talking about other dates without us knowing if
18 we're available, if our experts are available, if our other
19 witnesses are available. Because everybody's got to travel.

20 THE COURT: Yes, I understand.

21 MR. ORTIZ: We're talking about the summer travel
22 season.

23 MR. McELFISH: Judge, let me ask you a question, and
24 I don't know if this is an appropriate question. You'll tell
25 me, I'm sure. This gentleman, he's actually a nice guy, his

1 name is Judge Delaney. I'm going to go in again on Thursday
2 with another motion. Any chance you would speak to him? And
3 maybe he thinks I'm kidding around or something. I don't know
4 what it is. I've never been put quite in this position in all
5 these years. And maybe he'll grant it on Thursday, and the
6 issue's resolved. But I didn't want to not bring it up
7 because I could be stuck,

8 THE COURT: I would talk to him, for sure. You
9 could --

10 MR. McELFISH: Okay.

11 THE COURT: You could tell him that and that I am
12 having a very difficult time finding another time for you to
13 try the case.

14 MR. McELFISH: I mean --

15 THE COURT: I just -- I set this -- how many -- how
16 long ago did we set this?

17 MR. McELFISH: You set this actually the first and
18 second week in I think it was February. So anyhow, I'll go in
19 Thursday. That makes me feel a little better. I'll try to do
20 it without bringing any of that up. If he grants it, the
21 issue's over. If he denies it, I'm just going to ask him to
22 speak to you. And I'll provide the Court with the information
23 and that'll be that, whatever happens.

24 Again, I hate bringing it up.

25 THE COURT: Yeah.

1 MR. McELFISH: And I'm not asking for a continuance
2 of this case. I want to do this case, Bauta.

3 THE COURT: Do you --

4 MR. McELFISH: I'm ready to go.

5 THE COURT: In your post-trial motions, you included
6 cases on pain and suffering?

7 UNIDENTIFIED SPEAKER: Yep.

8 MR. McELFISH: Yes.

9 THE COURT: All right.

10 MR. McELFISH: I don't know if you remember this or
11 not, but under the Gasperini ruling, one of the things that
12 was discussed was both sides could actually have a Gasperini
13 hearing about the value and call experts as to what they
14 thought the value was.

15 MR. ORTIZ: We actually --

16 MR. McELFISH: Am I -- can I just -- let me just --
17 I'm sorry. Let me just --

18 MR. ORTIZ: Sure. [Indiscernible]

19 MR. McELFISH: And my suggestion was we agree on as
20 an expert in the value of the case, we agree on the mediator
21 that we used who was chief of the Second Circuit. What was
22 his name?

23 THE COURT: No. He was the chief of the Second
24 Circuit --

25 MR. McELFISH: I'm sorry. The Second --

1 THE COURT: -- Second Department.

2 MR. McELFISH: -- Appellate Division.

3 THE COURT: Second Appellate Division.

4 MR. McELFISH: Second Appellate Division.

5 THE COURT: Judge Berlin.

6 UNIDENTIFIED SPEAKER: Yeah, Judge Berlin.

7 MR. ORTIZ: Ariel Berlin. Yeah, we actually opposed
8 that application in the post-trial motion and pointed out that
9 there's no history of any Gasperini hearings ever and that
10 it's the province of the court to determine material deviation
11 in general. So just to let you know. It's fully briefed in
12 our opposition to the post-trial motion from the plaintiffs or
13 we dealt with that.

14 THE COURT: Okay. You're going to talk to Mr.
15 Paticucci, Mr. Barmen?

16 MR. BARMEN: Yes, Your Honor. We will.

17 THE COURT: All right.

18 MR. BARMEN: Yes, Your Honor. We will.

19 THE COURT: Okay.

20 MR. BARMEN: And how would you like us to -- just
21 call your chambers back or shoot you an email after we speak
22 to him? You know, yay or nay, he's not making a decision or
23 no, it isn't or send you a letter? How would you like us to
24 address that?

25 THE COURT: Why don't you call chambers. So Mr.

1 McElfish, I take it that you are amenable to at least --
2 you're amenable to this?

3 MR. McELFISH: I'm amenable to hearing the number,
4 sure.

5 THE COURT: Okay.

6 MR. McELFISH: And if it's a number we can accept,
7 we're amenable to take it.

8 THE COURT: All right. So, Mr. Barmen, why don't
9 you call chambers back? How soon could you do it, a couple of
10 days?

11 MR. BARMEN: The hope would be tomorrow, but
12 certainly.

13 THE COURT: All right. Do it by Thursday, if you
14 can by Thursday at 4:00.

15 MR. BARMEN: Will do.

16 THE COURT: All right. And if that's -- if you both
17 are amenable to that, we'll propose numbers for past and
18 future pain and suffering and we'll see if it works. And then
19 you won't have to come deal with me for two weeks.

20 MR. McELFISH: I was looking forward to it.

21 MR. BARMEN: I was hoping we'd have a day-long
22 hearing on Valentino.

23 THE COURT: Oh, no. And all right, we do have one
24 more issue, right, that this motion about the punitive damages
25 or there's a pre-motion.

1 MR. ORTIZ: Yeah, we didn't know if that was
2 appropriate to raise now or not because it really has nothing
3 to do with what this trial is, Your Honor, but we're certainly
4 prepared to discuss it.

5 THE COURT: I don't want to talk about it.

6 MR. SHAUB: Jonathan Shaub, Your Honor, I was
7 looking forward to it. I've been waiting for two hours to
8 discuss this issue with you.

9 THE COURT: Yes.

10 UNIDENTIFIED SPEAKER: He's all upset now.

11 THE COURT: That's all right. I'm sure he'll raise
12 it at every break during the trial.

13 MR. SHAUB: Absolutely, Your Honor. But, yes, if
14 you could, this was our premotion letter, nor out actual
15 motion on the issue.

16 THE COURT: Yes. Yes. All right. Well, why don't
17 we break then unless there's something else we need to talk
18 about.

19 MR. McELFISH: I'll just say that if Judge Delaney
20 denied the motion, I'll make calls to your courtroom with the
21 phone number, name, and case number.

22 THE COURT: Great. Okay. Thank you, gentlemen.
23 (Proceedings concluded at 5:36 p.m.)

24 * * * * *

25

1 I certify that the foregoing is a court transcript from
2 an electronic sound recording of the proceedings in the above-
3 entitled matter.

4 
5

6 Shari Riemer, CET-805
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8 Dated: May 31, 2019
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